BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments	)	MB Docket No. 07-51

REPLY COMMENTS OF COMCAST CORPORATION

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Comcast Corporation ("Comcast") hereby responds to the comments filed in response to the above-captioned Notice of Proposed Rulemaking ("*Notice*") regarding the use of exclusive contracts in the provision of video services to multi-dwelling units ("MDUs") and other real estate developments.[1] These comments provide abundant reasons why the Commission should not -- and cannot -- interfere with current marketplace arrangements between multichannel video programming distributors ("MVPDs") and MDUs and other real estate developments.

I. INTRODUCTION AND SUMMARY

Responses to the Notice were filed by numerous parties of diverse size, background, and interests, including real estate interests like the Real Access Alliance ("RAA") and Community Associations Institute ("CAI"),[2] private cable operators ("PCOs") like OpenBand

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1 *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Notice of Proposed Rulemaking, 22 FCC Rcd 5935 (2007) ("*Notice*").

2 The variety of real estate interests which filed first round of comments underscores the complex nature of the marketplace and further illustrates the difficulty of justifying regulatory intervention. *See*, *e.g.*, ACUTA, Inc. Comments at 3-9 (highlighting unique characteristics of student housing). One particular type of real estate development that Comcast mentioned, and that the Commission should closely

(footnote continued…)

and Yginition, incumbent local exchange carriers ("ILECs") like Verizon, AT&T, and Embarq, and traditional cable operators like Time Warner Cable and Comcast. With very few exceptions, commenters agreed on four counts: first, there are substantial pro-competitive, pro-consumer effects of exclusive agreements; second, any Commission actions in this area have a very high probability of adversely affecting other competitive services, particularly voice and broadband; third, any rules that treat competitors differently will have negative consequences for competition and consumers in the long run; and fourth, the Commission has no authority to act in this area, and certainly no authority to abrogate existing contracts.

It is also apparent from the initial round of comments that the agitation for action in this area is coming primarily from two huge ILECs -- namely Verizon and AT&T, each of which is larger than the entire cable industry in terms of revenues and has a market capitalization greater than any single cable operator -- and not consumers. It is equally clear that those ILECs, not consumers, would be the primary, if not sole, beneficiaries of any Commission intervention in the marketplace. This proceeding represents yet another effort by the ILECs to obtain regulatory favors to aid them in their tardy entrance to the video business. Prohibiting exclusive MDU agreements for video services may well help Verizon and AT&T, but it would ultimately harm consumers.

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(…footnote continued)

> scrutinize, is privatized military housing. *See* Comcast Comments at 18. As the Department of Defense is contracting with private parties to develop or renovate housing on and around military bases in the U.S., it has thus far decided to take a "hands-off" approach to the question of whether these new housing developments should have exclusive agreements with video providers, presumably because it believes that allowing the developer to negotiate such a contract is in the best interests of the eventual tenants and property owners. It is difficult to imagine how the Commission, were to it prohibit exclusive agreements in other MDUs, could possibly justify allowing other agencies of the Federal government to engage in exactly the same kind of behavior that the Commission deems inappropriate for private parties.

II. THE MARKETPLACE IS WORKING: COMMENTERS IDENTIFIED HOW EXCLUSIVE CONTRACTS CAN HAVE SIGNIFICANT PRO-COMPETITIVE AND PRO-CONSUMER EFFECTS.

The initial comments provide abundant evidence that exclusive contracts can have significant pro-competitive, pro-consumer effects. Unlike the Bell telephone companies, whose 100-plus-year monopoly guaranteed their access to every building in their service areas, cable operators have had to negotiate for access to buildings, and they have had to *compete* with other video providers -- some franchised, many not -- to obtain these access rights. In some situations, building owners and the MVPD have decided that an exclusive access arrangement is the most beneficial: such agreements can enhance the value of the property, and its attractiveness to potential tenants, by encouraging *lower prices*, increased quality of service, and new and improved products and services, while they allow the MVPD some time to recoup the value of their investments. At the same time, many property owners and MVPDs have made a different decision, by choosing exclusive wiring, exclusive marketing, or no exclusivity at all. Commenters representing of hundreds of MDU owners, as well as multiple MVPDs (large and small), have provided hard evidence of a vibrant and competitive marketplace, in stark contrast to the hyperbole and bluster offered by AT&T and Verizon.

Parties demonstrated that one of the primary benefits that accrue to consumers in MDUs from exclusive agreements is lower prices; MDU owners can and do negotiate prices for video services that are lower than the prevailing prices in the area. RAA and CAI pointed out that the ability to bargain for and reach exclusive agreements -- be they exclusive marketing, exclusive wiring, or exclusive access -- gives their members the ability to extract lower prices

from MVPDs.[3] RAA notes that "[a]greements between building owners and providers may reduce subscriber rates in various ways," including waiving certain charges, "such as installation costs or the first month's services," and sometimes through bulk discounts.[4] Even AT&T's "Exhibit A" -- which presumably was intended to prove the existence of a problem warranting Commission intervention -- highlighted a situation where MDU residents obtained Comcast's video service for 35 percent *below* the prevailing price in the community (with discounts of 50 percent on bundled services).[5] Surely, for a Commission that has focused so much attention on cable prices, this agreement demonstrates how exclusive arrangements can bring tangible and substantial benefits to consumers.

Parties also noted that MDU owners are able to negotiate increased quality of service and responsiveness from the MVPD through the use of exclusive agreements, as well as deployment of top-of-the-line services and products. Real estate commenters noted that having the ability to negotiate for exclusive deals gives them flexibility and leverage in working with providers. For example, RAA says "[o]ne of the most important benefits [of exclusive agreements] for residents is the quality of service commitments building owners typically require in exclusive agreements."[6] The CAI notes that its member associations often use exclusive agreements to "obtain the benefits of a range of other amenities," including "special community

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3 *See*, *e.g.*, Real Access Alliance ("RAA") Comments at 16-18; Community Associations Institute ("CAI") Comments at 5-7. And, as RAA discussed at length, whether by function of law or the marketplace, franchised cable operators like Comcast cannot simply charge a higher price in an MDU because they happen to have an exclusive with the MDU. RAA Comments at 36-39.

4 RAA Comments at 17.

5 AT&T Comments, Exhibit A.

6 RAA Comments at 17.

channels" and "upgraded facilities and introduction of new services."[7] The Greenfield Service Provider Coalition ("GSPC") explains that exclusive contracts actually *foster* broadband deployment because such agreements "allow new entrants to enjoy the fruits of their investment through an assured revenue stream."[8]

The commenters also noted that, in many situations, the MVPD will simply not be able to provide the services, products, and levels of service demanded by the MDU owner without the certainty that comes with an exclusive agreement. For example, OpenBand says "[i]t is simply not possible to convince owners, directors, investors or lenders to finance the construction of such capital-intensive networks in such limited markets unless the networks will be able to serve a significant portion of the households in the developments for periods long enough to recover their projected investment and operating costs."[9] Further, RAA has found that "permitting such agreements gives service providers greater incentive to upgrade facilities or install facilities in new buildings, *especially in smaller properties and properties with less affluent residents*."[10] In other words, many consumers in MDUs enjoy these new and innovative services because MDU owners and MVPDs had the freedom to negotiate exclusive agreements. This is true whether the provider in question is a smaller provider like OpenBand or Yginition, or a franchised cable operator like Comcast -- or Verizon.

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7 CAI Comments at 5, 7.

8 GSPC Comments at 21.

9 OpenBand Comments at 4.

10 RAA Comments at i (emphasis added).

Notably, several of the MVPDs that recognize the benefits of exclusive MDU agreements (e.g., OpenBand,[11] Ygnition,[12] etc.) are NOT franchised cable operators. Serving an MDU does not necessarily involve using public rights-of-way, so in many states companies can serve MDUs without obtaining a cable franchise, without making the investment necessary to serve throughout a franchise area, and without taking on the other obligations of a franchised cable operator. As a result, there are generally more companies prepared to serve MDUs and private real estate developments than are able to serve the rest of any given community. In that sense, MDU residents enjoy even greater competition than other community residents, regardless of whether each individual consumer in a particular building has a choice as to his or her MVPD.[13]

The main parties who find some deficiency in this form of competition are ILECs like AT&T and Verizon, which, having come late to the video party, once again seek FCC help in catching up. Instead of providing any evidence that exclusives are anti-competitive or unfair, however, their primary line of argument seems to be that MDU owners have been duped by the

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[11] OpenBand Comments at 5 (noting that "exclusive contracts actually increase competition over time as they raise the service and service quality bar for all providers and produce both an increased level and scope of services and decreased prices throughout the marketplace).

[12] Yginition Comments at 1-2.

[13] Even Qwest notes that "[t]he Commission has long recognized that the MDU market is unique, substantial and *highly competitive*." Qwest Comments at 4. One commenter complains that certain state laws mandate access to MDUs but only for franchised cable operators. IMCC Comments at 5. This is not a basis for Commission action. In such states, where PCOs wish to avail themselves of mandatory access, they simply need to acquire a franchise -- a process that the Commission recently "streamlined." *See In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 (2007). As the Commission found in that proceeding, franchised cable operators must abide by certain obligations, such as franchise fees, PEG/I-Net assistance, and reasonable build-out requirements. That PCOs choose not to undertake these obligations, and thereby fail to secure the right to mandatory access under the terms established by the state legislature, does not make such laws "anti-competitive."

MVPDs with which they have entered into agreements.[14] The submissions of the RAA and other real estate commenters soundly refute any such notion. For example, CAI notes that "association members are also capable of making rational, informed decisions about how their communities should be run, which may entail making compromises and trade-offs."[15] RAA's comments underscore that "exclusive contracts serve an important business function by allowing property owners and service providers to allocate the cost of wiring infrastructure."[16] There is no evidentiary support for the notion that property owners do not know what they are doing.

Comments submitted by RAA and CAI also compellingly refute other ILEC arguments, such as the idea that cable companies are bullying MDU owners into exclusive contracts to lock out competition. As noted above, RAA and CAI provide ample evidence of legitimate reasons for entering into such contracts. Further, none of the declarants supporting the RAA reported any recent surge in exclusive access agreements.[17] If anything, the record evidence suggests that it is Verizon and AT&T and other progeny of the Bell monopoly, and not the cable operators, who are leveraging their positions to browbeat MDU owners into accepting unreasonable terms. For example, RAA notes that "[t]elecommunications providers have … demonstrated a willingness to use their control over voice services as leverage in

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[14] *See*, *e.g.*, Verizon Comments at 8 (arguing that "many building owners are not aware that they . . . may have previously entered into an exclusive access agreement"); AT&T Comments at 12 ("[T]he building owner may not even be aware that it is excluding new entrants from its property.").

[15] CAI Comments at 3.

[16] RAA Comments at 15.

[17] See, e.g., RAA Comments, Exhibit C, ¶ 5 ("In my experience, we have not witnessed any increase in requests for [exclusive] agreements from video service providers in recent times.")

negotiations with apartment owners and other real estate developments."[18] Surely, the Commission does not need to give these companies any further regulatory leverage.

The ILECs' claims about the use and potential abuse of exclusive agreements should be taken for what they are: gross hyperbole. For example, Verizon cites to a filing in another docket which claims that nearly a quarter of all households are located in MDUs with 50 or more residents,[19] but fails to provide any information that either shows how many of those households actually are subject to an exclusive agreement or establishes that such agreements produce harms that exceed their benefits. Surewest at least tries to collect data about the number of exclusives in its area, but, when it cannot collect all the data it needs, it assumes the worst -- that all MDUs which did not reply to its survey are subject to an exclusive.[20] Further, even if Surewest's assumption were true, it is not necessarily the case, as Verizon would have the Commission believe, that all of these residents are prevented from choosing an alternative provider.[21] For one thing, the Commission cannot ignore the fact that over 121 million people live in states that have mandatory access statutes,[22] effectively rendering null any exclusive access agreements. For another, as Comcast explained in its comments, the Commission's OTARD rules ensure that millions of residents of MDUs and other real estate developments throughout the entire country

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18 RAA Comments at 48.

19 Verizon Comments at 6.

20 Surewest Comments at 3.

21 *See* Verizon Comments at 4 (stating that "[o]nce a property owner or manager signs an exclusive access agreement, residents are prevented from choosing alternative services they might prefer").

22 *See* Comcast Comments at 21 (using data pulled from the Census Bureau home page).

have at least *two* additional alternatives -- DIRECTV and EchoStar -- as AT&T, Verizon, and the other Bells are well aware.[23]

In short, the broad and inaccurate brush strokes painted by AT&T, Verizon, and the other progeny of the Bell monopoly run counter to the broad array of record evidence demonstrating the complexity of the MDU video marketplace, as well as the intense competition between providers of all shapes and sizes and the benefits that consumers accrue from that competition. The opponents of exclusive access agreements have offered no credible evidence of consumer harms to counter the pro-consumer, pro-competitive benefits identified by numerous commenters in this proceeding, and recognized by the Commission in previous proceedings. Comcast joins RAA and CAI and the other commenters who urge the Commission to exercise caution in assessing the marketplace and not to hand the Bells even more regulatory favors that will no have discernable, positive effect on consumers.

III. COMMISSION ACTION IN THIS PROCEEDING MAY ADVERSELY AFFECT THE MARKETPLACE FOR VOICE AND BROADBAND SERVICES.

The comments reflect widespread recognition of the need for the Commission to understand the interplay between the telecom inside wiring rules and the cable inside wiring rules, and to ensure that it is not establishing a regime where competitors are operating under rules that give one or another a distinct regulatory advantage. In light of the Commission's oft-stated goal of developing facilities-based competition, especially for voice services, the

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[23] As detailed in some of the attachments to Comcast's comments, the Bells are partnering with EchoStar and DIRECTV to offer bundled services to consumers. *See*, *e.g.*, Comcast Comments, Exhibits H-J. Certainly, it cannot have escaped their attention that consumers in MDUs can purchase these services regardless of any agreement the building owner has with another MVPD.

Commission should heed Embarq's advice that it "not look at any one of these three services [voice, video, or broadband Internet] in isolation."[24]

Several parties noted that Commission action in this proceeding may actually work to impede facilities-based competition in the voice and broadband marketplaces because of the fact that most providers use a single wire to provide all three services. For example, Charter notes that, "if the Commission were to terminate existing contracts, cable operators would lose the very lines they now rely upon to offer competing voice services to MDU residents."[25] Because of the way the cable inside wiring rules work, unlike the telecom inside wiring rules, the cable operator could effectively be forced to turn over the wire to the competition if the subscriber switches merely his or her video service. In the process, the subscriber may well lose access to his or her only other option for facilities-based voice services and broadband Internet services.

Based on the comments in this proceeding, it is clear that the ILECs for some time have been using regulatory differences, such as the differences between the telecom inside wiring rules and the cable inside wiring rules, to their advantage.[26] The ILECs already have significant regulatory advantages to ensure their access to MDUs; for example, many local

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[24] Embarq Comments at 3.

[25] Charter Comments at 7.

[26] For example, RAA notes that "it would appear that the cable inside wiring rules apply to facilities installed by the ILECS inside buildings" because they "are using those facilities to provide video services." However, "the ILECs assert that only the telephone rules apply to them." Combined with other ILEC behavior, such as placing the demarcation point at each individual unit, "the ILECs can then assert the right to control wiring inside a building all the way through the building, regardless of the services being provided over the wiring." RAA Comments at 58. It bears emphasis that telephone companies typically have their own wires in every MDU in a community, connected to each individual tenant's unit, and they often installed these wires without having to negotiate and make concessions of the sort that commonly are required of video service providers.

ordinances effectively require giving the ILEC access to the property.[27] Giving the ILECs further regulatory leverage by granting them their desires in this proceeding would actually harm competition for consumers in MDUs.[28] The last thing the marketplace needs is any further effort to create still more advantages for Verizon and AT&T.

IV. COMMISSION ACTION THAT DISCRIMINATES AMONG PROVIDERS OF VIDEO SERVICES WILL HARM COMPETITION AND CONSUMERS.

Parties also spoke with a clear voice on some of the more radical proposals reflected in the *Notice*, including the idea of using "market power" to deny exclusive access agreements to some parties but not others, and of promulgating rules that interfere with existing contracts. Even Qwest broke ranks with the other ILECs in suggesting that the Commission should not abrogate existing contracts.[29]

Several parties made the common sense point that prohibiting certain market participants, but not others, from entering into exclusive contracts would be counterproductive. Further, it is apparent that any abuses of market power are coming not from cable companies but from ILECs. As the real estate commenters explain, it is often the ILECs, such as Verizon and AT&T, which are leveraging their market position in voice to extract better terms and conditions, and even certain property rights, from MDU owners.[30] For example, RAA says "[t]he fact is that the traditional Bell companies have, if not market power in the provision of telephone service,

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27 *Id.* at 47.

28 *Id* at 59-63.

29 Qwest Comments at 3 ("Qwest recommends that the Commission *prospectively* prohibit exclusive contracts.") (emphasis added).

30 *See*, *e.g.*, RAA Comments at 46-52.

then at least a highly recognized brand name, that virtually guarantees their entry into apartment buildings for that service,"[31] and the Bells "have little trouble getting physical access to buildings for their networks."[32] The RAA concludes: "because of all these advantages, the ILECs are in a much better competitive position than any other group of providers, which poses the threat that, *if given further regulatory benefits, they will reinstate monopoly control in many markets*."[33]

Those parties which offer some support for the Commission's proposal, such as the PCOs, offer tepid support, at best. Their response can best be described as "we would prefer you stay out entirely, but, if you must interfere, do so in a way that only harms somebody else." These comments came primarily from companies that have the advantage of incumbency but not of scale. They do not really offer any principled reason for barring exclusive contracts by larger operators; they just want to ensure that, if any prohibition on exclusive contracts is adopted, it does not apply to them.

The only support for abrogating existing contracts seems to come from ILECs, such as Verizon and AT&T, whose primary justification for doing so seems to be that the MDU owners did not know what they were doing when they signed the exclusive agreements.[34] This is ludicrous. As explained above, the property owners and developers have amply refuted this theory. Further, even in the *Competitive Networks* proceeding, where the Commission was dealing with a situation in which tenants were locked in by much longer leases and there was

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31 *Id.* at 60.

32 RAA Comments at 61.

33 *Id.* (emphasis added).

34 *See supra* note 14.

vastly less competition than in the current MDU video market, and the Commission was operating on a firmer legal foundation, the Commission chose not to abrogate existing contracts.[35] For the Commission to reverse course on this important question would require significant record evidence and powerful justification, neither of which exists here.

V. THE COMMISSION HAS NO AUTHORITY UNDER TITLE VI OR ANY OTHER PROVISION OF THE COMMUNICATIONS ACT TO REGULATE THE RELATIONSHIP BETWEEN MVPDS AND MDUS.

The most fundamental problem with the *Notice*, as many commenters make clear, is that the Commission simply does not have the legal authority to take the actions it is proposing. Nothing in Title VI or the general "ancillary jurisdiction" provisions of the Act provides a basis for prohibiting exclusive agreements for the provision of video services in MDUs.

Virtually all commenters agreed that no provision of Title VI gives the Commission the authority to regulate the relationship between MDUs and MVPDs. For example, as Comcast noted in its initial comments, the *Notice* was on thin legal ice in looking primarily to Section 628, which prohibits vertically-integrated satellite broadcast *programming* vendors from

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[35] *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 22983 ¶ 36 (2000). It bears noting that some parties to this proceeding seem to believe that the Commission should go *further* than it did in the Competitive Networks Order. *See*, *e.g.*, AT&T at 6-7 (asserting that "the provision of telecommunications services is far more competitive than the provision of multi-channel video services," and that, as a result, the Commission should both prohibit exclusive agreements prospectively and prohibit the enforcement of existing agreements). This outlandish suggestion goes straight to the heart of AT&T's credibility as a commenter in this proceeding. The Commission put forward ample reasons for being less concerned with the residential market than with the commercial market (e.g., longer leases for tenants in the commercial context), and there are compelling reasons why the Commission was more concerned about exclusive access arrangements in the telecommunications context. In the Competitive Networks proceeding, the Commission was dealing with the problems resulting from century-old monopoly that had access to every building in a given community, and was acting under specific legislative direction that had declared it to be the highest priority of communications regulation to bring competition to that marketplace. Here, in contrast, the Commission is dealing with a situation where multiple providers have been constantly vying to provide MVPD service to any particular building or development and the providers must negotiate with the property owner or manager to access the property, and the relevant congressional decision was *not* to intervene in this marketplace (beyond what was done in the OTARD rules).

engaging in behavior that prevent MVPDs from providing satellite cable or broadcast *programming* to consumers.[36] Given the provision's sole focus on access to *programming*, it is no surprise that commenters were nearly unanimous in the opinion that nothing in Section 628 gives the Commission authority to regulate the relationship between MVPDs and MDUs.[37] As CAI put it, the only way Section 628(b) could possibly be construed to supply the Commission with the necessary authority to regulate exclusive agreements between MVPDs and MDUs is if it were "read in isolation…by a person with no knowledge of the history of the communications industry."[38]

Of course, both AT&T and Verizon have long histories in communications. Further, both AT&T and Verizon know full well that Section 628 is a program access provision.[39] Given those facts, efforts by Verizon and AT&T to concoct a broad anti-exclusivity prohibition out of Section 628 are confused, at best, and disingenuous, at worst. For example, AT&T's contention that Section 628(b) *explicitly* renders unlawful the use of exclusive access contracts is an impermissible and dangerous jump in statutory construction.[40] AT&T could just as easily argue that the First Amendment prohibits the Commission from treating IPTV as a Title VI service

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36 47 U.S.C. § 548.

37 *See*, *e.g.*, RAA Comments at 29-36; CAI Comments at 12-17; NCTA Comments at 6.

38 CAI Comments at 13.

39 See *AT&T Services, Inc. v. Rainbow Media Holdings*, Program Access Complaint, CSR-7429-P (June 18, 2007) (alleging violations of Sections 628(b) and 628(c)); *Verizon Telephone Companies v. Rainbow Media Holdings*, Program Access Complaint, CSR-7010-P (Mar. 20, 2006) (same).

40 AT&T Comments at 20 (claiming that "Section 628(b) renders unlawful efforts by "cable operators" to "hinder significantly or to prevent" competition from multichannel video programming distributors ("MVPDS") through the use of exclusive contracts that, by their terms, are designed to prevent MVPDs from providing such services to "subscribers or consumers" in MDUs").

because the First Amendment says "Congress shall make no law" regarding an ILEC's deployment of IPTV services, "or prohibiting the free exercise thereof."[41] Such a statutory construction would be no more ludicrous than the arguments AT&T puts forth in its comments about Section 628.

Attempts by Surewest and others to use Section 623 as a source of authority also fall short. First, as the RAA and CAI explain, Section 623 is irrelevant to the issue of exclusive service agreements between MVPDs and MDUs. On the one hand, the section simply directs the Commission to implement a detailed cable rate regulation scheme that applies to areas the Commission has not yet found to be subject to "effective competition."[42] In that case, the cable operator cannot charge a higher price to any subset of consumers in that franchise area. On the other hand, when there is "effective competition," Section 623 simply does not apply.[43] Even then, market forces ensure that the cable operators do not charge a higher price for service, regardless of exclusivity in a particular building.[44] Moreover, Section 623 directs the

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41 Or, Section 628 could just as easily be twisted to render AT&T's exclusive iPhone agreement with Apple unlawful. After all, Section 628 emphatically states that: "It shall be unlawful for a" wireless service provider to "engage in unfair methods of competition . . .the purpose or effect of which is to hinder significantly or prevent" other wireless service providers from being able to offer that equipment "to subscribers or consumers." And "exclusive contracts," such as those between a wireless carrier and a mobile device manufacturer, are among the specific types of practices that Congress included within the scope of prohibition that the Commission is required to implement. Needless to say, this is a gross distortion of what the statute actually says, but not very far from how AT&T is asking the Commission to read the statute.

42 The absence of an effective competition determination does not mean that an area lacks competition. It may just mean that, even though a compelling showing of effective competition has been presented to the Commission, very possibly one that drew no opposition from anyone, the Commission has failed to act.

43 *See* RAA Comments at 36-39; CAI Comments at 17-19.

44 *Id.*

Commission to establish rate tiers at the franchise level; nothing in the statute indicates any authority for the Commission to meddle in private contracts between two parties.[45]

Second, if Section 623 has any relevance to this proceeding, it is only because it implicitly *confirms the permissibility* of exclusive service agreements. Section 623(d) exempts bulk discounts to MDUs from uniform pricing component of the rate regulation scheme.[46] Congress clearly knew that such agreements were being made between building owners and MVPDs. Congress's acceptance of such agreements should do away with any notion that Section 623 has any relevance in this proceeding, and it should underscore for the Commission that Congress has not given it any authority to insert itself into the relationship between MDUs and MVPDs.

Numerous parties also agreed that the Commission's attempts to use Communications Act provisions outside of Title VI fall flat. Section 4(i) only fills in the gaps of the Commission's authority, but does not expand it.[47] These commenters all agreed with the DC Circuit Court of Appeals, which said that the Commission "literally has no power to act…unless and until Congress confers power upon it" and "has no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress."[48]

Likewise, Sections 201(b) and 303(r) are utterly irrelevant to the question before the Commission -- they are Title II and Title III provisions, which have nothing to do with services

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45 *See* CAI Comments at 17.

46 *See* RAA Comments at 37.

47 *See* RAA Comments at 40-44; CAI Comments at 22-24; NCTA Comments at 5; Time Warner Cable Comments at 11.

48 *American Library Ass'n v. FCC*, 406 F.3d 689, 698 (D.C. Cir. 2005).

provided under Title VI. Perhaps after being regulated as a monopoly under these provisions for almost a hundred years, it is no surprise that Verizon, AT&T, and other Bells would turn to these provisions first. However, their reliance is misplaced; as the D.C. Circuit has explained, Section 303(r)'s seemingly broad "public interest" clause is not a blank check to be used in the absence of a specific Congressional delegation of authority:

> "[t]he FCC cannot act in the 'public interest' if the agency does not otherwise have the authority to promulgate the regulations at issue. An action in the public interest is not necessarily taken to 'carry out the provisions of the Act,' nor is it necessarily authorized by the Act. The FCC must act pursuant to *delegated authority* before any 'public interest' inquiry is made under § 303(r)."[49]

Further, it might also be noted that the ILECs new-found enthusiasm for the expansive powers of Sections 201(b) and 303(r) is in decided tension -- to put it mildly -- with their scorched-earth litigation to prevent the Commission from implementing the local phone competition provisions of the Telecommunications Act of 1996.[50]

Parties also noted that Section 706 of the Telecommunications Act of 1996 is simply not an independent source of authority,[51] and, in any event, can just as easily be used to defend exclusive agreements as to prohibit them. As described above, several parties noted that exclusive contracts actually assist in this deployment of broadband services by assuring

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49 *MPAA v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (emphasis in original).

50 Remarkably, this campaign of obstruction did not end even after their arguments were largely rejected in not one but two decisions of the United States Supreme Court. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999); *Verizon Communications v. FCC*, 535 U.S. 467 (2002). Even more remarkably, the Commission ultimately capitulated to a significant degree even though its authority had been upheld. *See*, *e.g.*, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533 (2005).

51 RAA Comments at 39-40.

providers of the necessary return on investment they need to deploy such networks.[52] Further, as Comcast and other cable operators noted, the effect of the cable inside wiring rules, combined with Commission action in this proceeding, could work to turn over the cable operator's facilities to its competitor in the broadband marketplace, effectively reducing competition and stifling broadband deployment.

Finally, several parties pointed out that the Commission's proposals tread into legal waters that are properly patrolled by state and local governments, or that raise serious constitutional concerns. For example, the New Jersey Division of the Ratepayer Advocate could not have been more plain in explaining to the Commission that New Jersey has made its own choice for how to handle this situation, just as other states have made their choices, and it is not for the Commission to now overrule those decisions.[53] Additionally, despite AT&T's efforts to brush aside any Constitutional concerns raised in this proceeding, it is abundantly clear that any Commission interference with MDU access arrangements, each one individually negotiated, with bargained-for consideration, would present serious Constitutional concerns, especially if the Commission should decide it wants to abrogate existing agreements.[54]

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[52] *See*, *e.g.*, IMCC Comments at 6-9; Yginition Comments at 1-2.

[53] *See* NJ Division of Ratepayer Advocate Comments at 8 ("Such matters should be left to individual states to decide, absent Congressional direction to the contrary.").

[54] *See*, *e.g.*, Time Warner Cable Comments at 13.

VI. CONCLUSION

The record in this proceeding is clear that the Commission should refrain from acting to prohibit exclusive agreements between MVPDs and MDUs, or, at the very least, should only act with extreme caution and after significant deliberation and thought is given to the potentially harmful effects that may be visited upon competition in the video, voice, and broadband Internet marketplaces from Commission action.

Respectfully submitted,

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